80-1805

Office-Supreme Court, U.S.
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NO.

In The

Supreme Court of the United States

October Term, 1980

FRANK M. BOSWORTH, d/b/a
GULF TO BAY TITLE COMPANY,
Appellant,

v.

WILLIAM J. COONEY, as
EXECUTOR of the ESTATE OF
DONALD S. FORD, Deceased,
Appellee.

On Appeal From The Supreme Court Of Georgia

JURISDICTIONAL STATEMENT

FRANK M. BOSWORTH, Pro Se,
1518 Winfield Road West,
Clearwater, Florida 33516
Appellant

WILLIAM J. COONEY, Pro Se,
1104 Georgia Bank Building,
Augusta, Georgia 30902
Appellee

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Frank M. Bosworth, d/b/a
Gulf to Bay Title Company
Appellant,

v.

William J. Cooney, as
Executor of the Estate of
Donald S. Ford, Deceased,
Appellee.

On Appeal From the Supreme Court of Georgia.

JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED BY APPEAL

(a) This case presents the questions:

(i) Whether or not a default judgment

may be entered against a Defendant who has appeared Pro Se and also by counsel without notice of any kind being given by the Plaintiff to either the Defendant or his counsel without violating the Due Process Clause of the Constitution of the United States, and

(ii) Can a default judgment be entered against a Defendant without notice when the Court has before it a full set of facts showing that Plaintiff does not have a cause of action?

(b) The names of all parties to this proceeding appear in the caption of this case.

(c) Cases sustaining the jurisdiction of this Court are:

Sonus Corp. v. Matsushita Electric Industrial Co., Ltd., 61 F.D.644 (1974)

Ken-Mar Airpark, Inc. v. Toth Aircraft and Assessories Co., 12 F.R.D. 399 (1952)

Sniadach v. Family Finance Corp., 395 U.S.337, 89 S.Ct. 1820 (1969)

Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652 (1950)

Bass v. Hoagland, 172 F.2d 205, cert. den. 338 U.S. 816, 70 S.Ct. 57 (1947)

(d) The Opinions Below:

(i) The notification of the Supreme Court of Georgia dated February 3, 1981 denying Appellant's application for a Writ of Certiorari (with one Justice dissenting).

(ii) The opinion of the Court of Appeals of the State of Georgia dated October 20, 1980.

(iii) The Order of The Superior Court of Richmond County, Georgia denying

Appellant's motion to set the Judgment aside dated May 28, 1980.

(iv) The Judgment of the Superior Court dated April 29, 1980.

(v) The order of the Superior Court denying Appellant's motion to dismiss the Complaint for lack of Jurisdiction over the person and subject matter dated April 29, 1980. Refer to Appendices A, B, C, D, E and F - (Notice of Appeal)

(e) <u>The grounds upon which the Jurisdiction of this Court is invoked are</u>:

(i) A default judgment was entered without notice to Defendant or his counsel, the judgment as filed in the case being devoid of any showing that notice was given is a failure of due process.

(ii) The decision of the Supreme

Court of Georgia denying certiorari was issued February 3, 1981, and the Notice of Appeal was filed in the Supreme Court of Georgia and the Court of Appeals of Georgia on February 17, 1981; and, was also filed in the Superior Court of Richmond County, Georgia on April 21, 1981.

(iii) Jurisdiction of the Appeal is conferred on this Court by Title 28 of the United States Code, Section 1257.

(f) Statutes involved:

(i) This case involves the FOURTEENTH AMENDMENT to the CONSTITUTION of the UNITED STATES which provides:

Section 1. "....No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

(ii) The following provisions of the GEORGIA CIVIL PRACTICE ACT:

> 81-112 (CPA Sec. 12) Defenses and objections--when and how presented--by pleading or motion; motion for judgment on pleadings
>
> (a) .....
>
> (b) How presented
>
> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that following defenses may at the option of the pleader be made by motion in writing: (1) lack of jurisdiction over the subject-matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under section 81A-119. A motion making any of these defenses shall be made before or at the time of pleading if a further pleading is permitted".

81A-107 (CPA Sec.7) Pleadings allowed; form of motions

(b) Motions and other papers

(1) "An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion".

81A-154 (CPA Sec. 54) Judgments

(c) Demand for Judgment

(1) "A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings; but the court shall not give the successful party relief, though he may be entitled to it, where the propriety of such relief was not litigated and the opposing party had no opportunity to assert defense to such relief".

Full texts of the foregoing can be found in Appendices G and H.

(g) Statement of the Case.

(i) Plaintiff, Appellee herein, as an executor and two other parties (not made parties to this action) signed a contract for the sale of an island in South Carolina known as "Pritchards' Island", and at the time that the Plaintiff signed the contract prepared an escrow agreement for the handling of the down payment by the Gulf to Bay Title Co. of Clearwater, Florida, which only the Plaintiff as executor, and Defendant as proprietor of the Gulf to Bay Title Co. signed. The purchaser, Mr. Drahos, was a citizen of Ohio. The Defendant, a resident and citizen of Florida twice came to Georgia at the behest of the purchaser to obtain the signatures of Mr. Holley and Mrs. Ford, owners of Pritchards

Island. The Defendant was asked by Mr. Holley to also obtain the signature of the Plaintiff as Executor of the Estate of Donald S. Ford, deceased, late husband of Mrs. Ford, which Defendant did as stated herein.

(ii) The purchaser, Mr. Drahos, later caused both a $10,000.00 check drawn on a Cleveland Bank payable to Gulf to Bay Title Co., and a Demand Note for $40,000.00 also payable to the Gulf to Bay Title Co. to be delivered to the Title Company in Florida, which on instructions from Mr. Holley and Mrs. Ford, were presented to the Cleveland Bank for collection. Both items were dishonored and returned to the Gulf to Bay Title Co. Mr. Drahos, the purchaser, defaulted under the contract, and the Gulf to Bay Title Co., on in-

structions from the Plaintiff, delivered the dishonored check and note to Mrs. Ford.

(iii) Plaintiff in his capacity of Executor then brought this action alleging that Defendant should not have accepted the check and the note, asking $50,000.00 in damages. He commenced the action by having the Complaint served upon the Defendant in Florida claiming the benefit of the Georgia "long arm statute". Defendant being a member of the bars of New York and Florida, believing that the Court had no jurisdiction over his person, in addition to the obvious fact that Plaintiff had no interest in the cause of action because the estate of which Plaintiff was executor had no title to the property involved; after consulting Sec.81A-112 of the Georgia Statutes (Appendix H)

noted that under paragraph (b) thereof that every defense must be asserted by a responsive pleading "except that the following defenses may at the option of the pleader be made by motion in writing: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person...". Whereupon the Defendant made a motion in writing on the above two grounds, and in addition thereto pursuant to Sec. 81A-134 obtained an order directing the Plaintiff to produce a deed from the decedant to Mrs. Ford prior to his death. This deed was produced and conclusively shows the Plaintiff as executor of Donald S. Ford's Estate had no interest in the island. Defendant later added a motion to quash a demand Plaintiff had made for interrogatories before the first

motion came on to be heard.

(iv) The Defendant believing the above to be conclusive did not go to Augusta, Georgia but retained Stephen H. Steinberg, Esq. to attend the hearing. At the hearing the Court denied all of Defendant's motions and ordered that the interrogatories be answered within (20) twenty days. Mr. Steinberg sent the Defendant a copy of the order in Florida and then shortly thereafter counsel for Plaintiff served Mr. Steinberg with a copy of a Judgment by Default. Neither Mr. Steinberg nor the Defendant was notified of any application for the judgment by the Plaintiff or the Court. Neither Mr. Steinberg nor the Defendant has any knowledge of how the judgment was presented to the Court or how the Court was

induced to sign it, and neither the judgment nor files showed that Notice of Application for the Judgment was given either to the Defendant or his counsel. Defendant moved to set the judgment aside and his motion was denied, the Superior Court of Richmond County, Georgia giving no opinion but stating in the order, "Defendant did not file an answer to the Complaint", and nothing more.

(v) Defendant, through Mr. Steinberg, appealed to the Court of Appeals of Georgia enumerating seven errors of the Trial Court. The Court of Appeals in affirming the judgment dealt only with two (2) of the seven (7) errors enumerated, and the Court of Appeals thereafter denied Defendant's motion for a rehearing. Thereafter your Appellant, Pro Se, applied for a Writ of

Certiorari to the Supreme Court of Georgia specifying Denial of Due Process as the sole ground for reversal. The Supreme Court of Georgia, with one Justice dissenting, denied the Writ without opinion (Appendix A) on February 3, 1981. On February 17, 1981 the Notice of Appeal was filed with the Supreme Court of Georgia and the Court of Appeals of Georgia, and on April 23, 1981 a copy was filed with the Superior Court for the County of Richmond, Georgia. On March 9, 1981 the Court of Appeals of Georgia denied Appellee's motion for a Supersedeas Bond. (Appendix I)

(h) Reasons for plenary consideration

Appellant believes this case to be a matter of substantial gravity and importance and public concern deserving

plenary consideration, with briefs on the merits and oral argument. The writer in more than forty years of practice and experience in the practice of law in the States of New York and Florida knows of no instance where a Defendant, who first addresses himself to the matter of jurisdiction of the Court (as was done here in accordance with Sec. 12 of the Georgia Civil Practice Act), is not afforded the right to additional pleadings as may be required by the Court after a denial of Defendant's objections to the jurisdiction of the Court.

POINT I

THE DEFAULT JUDGMENT ENTERED WITHOUT NOTICE WAS A DENIAL OF DUE PROCESS

At the time Plaintiff's (Appellee herein) counsel presented the default

judgment for signature of the Court, the Court had a complete set of facts before it including both a copy of the Deed from decedent prior to death and an admission by the Plaintiff that title to Pritchards Island, the land involved, was never held by the Decedent's Estate of which Plaintiff was executor and in which capacity this lawsuit is being prosecuted. The Trial Court a few hours previously, after hearing contested motions, had issued an order directing the Defendant to answer interrogatories within twenty (20) days. The judgment automatically negated that order. Defendant who was represented by counsel was entitled to notice. (Georgia Civil Practice Act, Sec. 54) No notice was given until a copy of the judgment was served of Defendant's counsel. The Trial Court

erred in not setting the judgment aside when it was moved to do so, and the Court of Appeals erred in not reversing the action of the Trial Court.

The principle of law involved here is SIMPLE JUSTICE. It is elementary that no Court of Law in the United States should be permitted by its own rules to allow the entry of a Judgment in a contested action without the proper notice. This principle is set forth in Sonus Corp. v. Matsushita Electrical Industrial Co. Ltd. 61 F.R.D.644 (1974) where the Court said:

> "Failure to notify the Plaintiff of the application for judgment by default in compliance with F.R.Civ. P.-55 (b) is serious procedural error, but it does not of itself render a judgment void. (cases cited) However, failure to give any notice to the Plaintiff of the application for Judgment by default, which application was granted, raises a question of due

process. (Court's emphasis) (cases cited) (the right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest).....Neither Plaintiff nor its counsel was given any prior notice of motion for judgment by default or the hearing thereon, therefore due process was denied Plaintiff. (cases cited) A judgment is void within the meaning of F.R. Civ. P.-60 (b) (4) if inconsistent with due process of law. (cases cited)." (emphasis supplied).

It is undisputed that no notice was given to Defendant or his counsel of Plaintiff's application for a default judgment, and the record does not show that any notice was given. Any Court Rule which would indicate a different result than reached in the above case would be inconsistent with due process of law. If there is any fundamental difference between the Federal and the Georgia Codes it is not

apparent to the writer. Therefore the judgment herein is void. (See Appendices G and H).

POINT II

ENTRY OF A DEFAULT JUDGMENT AGAINST A DEFENDANT WITHOUT NOTICE WHEN COURT HAS FACTS BEFORE IT SHOWING PLAINTIFF DOES NOT HAVE A CAUSE OF ACTION IS A DENIAL OF DUE PROCESS.

In the State of Georgia the law recognizes that a default judgment cannot be given unless there is a valid cause of action alleged in the complaint. Section 54 of the Georgia Civil Act (Appendix H) takes cognizance of this fact.

This section provides: "...but the court shall not give the successful party relief, though he may be entitled to it, where the propriety of such relief was not litigated and the apposing party had no opportunity to assert defense to such relief."

Section 12, Georgia CPA (81A-112 Code

annotated) subsection (h) (3) provides:

> "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject-matter, the court shall dismiss the action."

The Appellant herein, from the very first paper filed in this case in the Court below, and through the Appeals process, not only has suggested that there was no jurisdiction over the subject matter, but that there was no subject-matter over which to take jurisdiction. Plaintiff-Appellee, your Appellant submits, has no rights in the subject-matter involved herein and has never offered any explanation of how he justifies his right to bring any action relative to the sale of Pritchards Island.

The complaint does not even allege

that the Plaintiff-Appellee had an interest in the island, or why, if there was a default on the part of the purchaser, Plaintiff-Appellee, a stranger to the land title, should share in any damages as a result of the purchaser's non-performance.

It is basic in granting any Default Judgment that there must be a cause of action. The Supreme Court of the State of Georgia supported this proposition in Houston v. Lowes of Savannah, Inc. 235 Ga. 2d 1, 219 S.E.2d 111 where it interpreted the Georgia Statute regarding the opening of defaults as including situations where "...the Judge from all the facts determines a proper case has been made for opening a default."

Federal Court Rules were similiarly

interpreted in Albert Levine Associates, Inc. v. Kershner, 45 F.R.D. 450.

The problem that the Appellant has had to face throughout this litigation has been his failure to induce the trial and appellate Courts to consider the real issue. The Trial Court's only reason or conclusion given in any of the several proceedings before it was stated in the Order Denying Appellants Motion to Set the Judgment Aside where the Court said "...Defendant did not file an answer".

There was never any comment made about the fact that the Complaint might not have alleged an adjudicable cause of action, although the Appellant pointed out to the Trial Court and again to the Appellate Courts that all Courts have "...the inherent power...to exercise such

efficient control over every proceeding... as to effectually protect every person actually interested in the result from injustice...and to prevent the Court itself and its process from being the instrument of wrong". See: Stewart v. Butler, 27 Misc. 708, N. Y. (1899) which contains an erudite restatement of every Court's inherent Power.

SUMMATION

One has the feeling that the efforts of the Trial Court, the Georgia Court of Appeals and then the Supreme Court of Georgia overlooked the basic fact that the Plaintiff-Appellee has no cause of action, in seeking ways to justify the entering of a Default Judgment without having first entered a Default or having given any notice to the Defendant-Appellant that

the Plaintiff-Appellee would apply for a Default Judgment. A partial listing of the matters overlooked or unexplained follows:

1. The Trial Court did not comment on Appellant's claim that Plaintiff was not a proper party and could not have been damaged.

2. The Trial Court did not explain why it ordered Defendant-Appellant to answer interrogatories in the same order it denied Appellant's Motion to Dismiss on jurisdictional grounds if the Court intended to give Judgment by Default. (Appendix D)

3. Why did Plaintiff-Appellee show on the Orders denying Defendant-Appellant's Motion to Dismiss and to Set Aside the Judgment that the orders were presented by the Plaintiff-Appellee (Appendix C & E) but failed to do so on the Default Judgment? (Appendix D)

4. Was the Georgia Court of Appeals mistakenly led to believe that the Plaintiff-Appellant, in replacing Mrs. Ford as Executor of her husband's estate, also replaced her personally as the owner of the

real property, known as Prichard's Island?

5. WHY HAVE ALL THREE GEORGIA COURTS REFUSED TO COMMENT ON THE FAILURE OF THE PLAINTIFF-APPELLANT TO GIVE NOTICE OF PRESENTMENT OF THE DEFAULT JUDGMENT TO DEFENDANT OR HIS COUNSEL?

6. WHAT IS THE MEANING OF THE DISSENT OF JUSTICE MARSHALL OF THE GEORGIA SEPREME COURT?

Throughout the entire proceeding the Defendant-Appellant was unable to get the Courts' attention focused on the justice or fairness of the treatment to which he believed he was entitled. Before it became a matter of Due Process, the Defendant-Appellant called the attention of each forum to the basic problem by referring to the case of Stewart v. Butler, supra, which sets forth the foundation of every Courts' conduct in preventing injustice or the failure of Due Process which

the Court in that case saw fit to quote from People v. Hektograph Co., 10 Abb. N.C. 359 as follows:

> "The court is vested with the control of its process, records, and proceedings so far as to prevent their being improperly employed, through fraud or collusion, to injure the citizen, or to deprive him of his just rights;" and he cites a large number of cases to support the proposition.

In the case of Albert Levine Associates, Inc. v. Kershner, supra, on a similar set of facts, even to the point of the Defendant being represented by an out-of-state attorney, the Defendant fared much better than the Defendant-Appellant herein. Excerpts from that case follow:

> "...defendants filed opposing papers and affidavits, prior to the expiration of their time to answer, to plaintiff's motion for summary judgment; that defendants' attorney is an out-of-state attorney; and that defen-

> dants' attorney was under the mistaken impression that plaintiff's motion for summary judgment, like his motion to dismiss, tolled the applicable time period for defendants to answer. See Rules 6(e) and 12(a). The court concludes that these reasons constitute good cause...In addition, the court has studied defendants' affidavits in opposition to plaintiff's motion for summary judgment. Plaintiff clearly is apprised of the nature of defendants' defense. Consequently, plaintiff has suffered no prejudice by defendants' excusable neglect to timely file an answer. Where no prejudice is shown, courts often deny motions for default judgments. United States ex rel. Houghton v. Scranton, 257 F.Supp. 557 (E.D.Pa.1966)".

Appellant submits, that

In the case at bar the Georgia Courts, by overlooking the above principles, have unjustly deprived him of his right to defend against a nonexistent cause of action resulting in a $50,000.00 Judgment against him; all in violation, not only of the laws of the State of Georgia, but

in violation of the FOURTEENTH AMENDMENT to the Constitution of the United States.

CONCLUSION

This appeal raises an issue of fundamental importance respecting the treatment by State Courts of citizens of sister States who seek a full hearing of their cause, especially where the Rules of the Court are not clearly understood by the guest defendant. If the kind treatment this Florida Citizen has summarily received in Georgia cannot be controlled the Due Process Clause of the Fourteenth Amendment of the Constitution will be without meaning.

Respectfully submitted,

Frank M. Bosworth, Jr.,
Pro Se

April, 1981.

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta FEB 3 1981

Dear Sir:

Case No. 37068 Bosworth v. Cooney, Exr.

The Supreme Court today denied the writ of certiorari in this case.
All the justices concur, except Marshall, J.,
dissents.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX A

60536. BOSWORTH v. COONEY.

QUILLIAN, Presiding Judge.

The defendant Bosworth, doing business as the Gulf to Bay Title Company, appeals from a default judgment entered against him

by the trial court, and the denial of his motion to set aside the judgment. *Held:*

1. Plaintiff Cooney, executor of the estate of Donald S. Ford, filed this action against the defendant Bosworth, a resident of Florida. The complaint alleged that Bosworth was subject to the jurisdiction of the court under our Long Arm Statute, Code Ann. § 24-113.1 (Ga. L. 1966, p. 343; 1970, pp. 443, 444), as "he came to the city of Augusta, State of Georgia, on several occasions to conduct negotiations for the sale of property which was the subject of certain escrow instructions and that he signed said escrow instructions while in Augusta, Georgia, on such a business visit."

The return of service shows Bosworth was served in Clearwater, Florida, January 25, 1980. Bosworth, an attorney, failed to file an answer but on February 22, 1980 — within the time to answer, filed a "Motion to Dismiss for Lack of Jurisdiction Over the Person and Subject Matter" as "Attorney Pro Se, appearing specially to contest the service of process and jurisdiction of the Court." Bosworth also filed a Memorandum of Law with 5 exhibits — the first exhibit being an affidavit by himself, and the remaining 4 exhibits are correspondence between the purchaser of the land and himself, the seller and himself, the Gulf to Bay Title Co. and the purchaser, and Gulf to Bay Title Co. and the widow of Donald S. Ford.

His affidavit shows he was "part owner" of the Gulf to Bay Title Company, and a resident of Florida. He received a letter from the prospective purchaser, Mr. James S. Drahos, of Ohio, proposing to purchase Pritchard's Island, Beaufort, South Carolina, which was then thought to be owned by R. Eugene Holley of Augusta, Georgia, and Mrs. Helen T. Ford, the widow of Donald S. Ford. Before his death Donald S. Ford had told Bosworth he had transferred his title to his wife and that she and Holley each owned a one-half interest in the island. Bosworth stated that he took the contract to Mr. Holley — presumably in Augusta, and to Helen Ford — who rejected it. He asked Mr. Holley to write him a letter with acceptable conditions, which he forwarded to Mr. Drahos. He made the changes in the contract and met Mr. Holley in Valdosta where Mr. Holley signed the contract. Thereafter, he went to Augusta, Georgia to obtain Mr. Cooney's signature — who had replaced Mrs. Ford. While in Cooney's office in Augusta, he signed the escrow contract for Gulf to Bay Title Company as the escrow agent. Drahos put up a check and promissory note totaling $50,000, but later defaulted on both.

A hearing was held on April 28, 1980 on defendant's motion to dismiss and the court denied the jurisdictional motion and entered default judgment because the defendant had not filed an answer to the complaint or moved to open the default.

The Long Arm Statute authorizes courts of this state to exercise personal jurisdiction "over any nonresident . . . as to a cause of action arising from any of the acts . . . enumerated in this section, in the same manner as if he were a resident of the State, if in person or through an agent he: (a) Transacts any business within this State . . ." Code Ann. § 24-113.1, supra. "[J]urisdiction over a nonresident exists on the basis of transacting business in this state if the nonresident has purposefully done some act or consummated some transaction in this state, if the cause of action arises from or is connected with such act or transaction, and if the exercise of jurisdiction by the courts of this state does not offend traditional fairness and substantial justice . . . [T]he trend of opinions is to construe long arm 'transacting any business' statutes most liberally and to uphold the jurisdiction of the court of the plaintiff's residence in actions arising, either directly or indirectly, out of such transactions." *Davis Metals v. Allen,* 230 Ga. 623, 625-626 (198 SE2d 285); Accord: McGee v. International Life Ins. Co., 355 U. S. 220, 222 (78 SC 199, 2 LE2d 223). "In order to satisfy the constitutional requirement of procedural due process, it must be shown that the nonresident defendant has some 'minimum contact' with the forum state so as to make that state's exercise of jurisdiction over the defendant reasonable." *Timberland Equip. Ltd. v. Jones,* 146 Ga. App. 589, 590 (246 SE2d 709); Accord: Kulko v. California Superior Court, 436 U. S. 84, 91 (98 SC 1690, 56 LE2d 132). "[T]here is no violation of due process or the underlying principles of traditional fairness and substantial justice when reasonable notice and opportunity to defend are present [as in the instant case]. *Delta Equities v. Larwin &c. Investors,* 133 Ga. App. 382, 384 (211 SE2d 9)." *North Peachtree I-285 Properties v. Hicks,* 136 Ga. App. 426, 429 (221 SE2d 607). "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." McGee v. International Life Ins. Co., 355 U. S. 220, 223, supra.

We find the defendant's trips from Florida to within this state to negotiate the contract of sale and escrow contract, and execution of the escrow contract in Augusta, which is the basis for this action, provide sufficient "minimum contact" within the meaning and intent of our Long Arm Statute. *Porter v. Mid-State Homes,* 133 Ga. App. 706 (1) (213 SE2d 10); *North Peachtree I-285 Properties v. Hicks,* 136 Ga. App. 426, 428, supra; *Greenfield v. Portman,* 136 Ga. App. 541, 544 (221 SE2d 704); *Brooks Shoe Mfg. v. Byrd,* 144 Ga. App. 431, 432-433 (241 SE2d 299); *Bailey v. London Marina,* 151 Ga. App. 73, 74 (258 SE2d 738). The trial court did not err in denying defendant's motion to dismiss for lack of jurisdiction over the defendant and the subject matter.

2. The defendant alleges that the trial court erred adjudging him to be in default for failure to file an answer as "the document filed by the Defendant constituted an Answer, and the action was not in default at the time the Default Judgment was granted."

The action was filed January 16, 1980 in Richmond County, Georgia. The defendant was personally served on January 25, 1980, in Clearwater, Florida. On February 22, 1980, he filed a "Motion to Dismiss" for lack of jurisdiction over him and the subject matter, and a "Motion" for an order directing the plaintiff to produce a deed from Donald S. Ford to his wife. At that time he filed a "Memorandum in Support of Defendant's Motions to Dismiss," which included an affidavit by himself as to the facts of this case, and four additional letters regarding communications between the parties. The issue before this court is whether the Motions to Dismiss and Produce a deed, the Memorandum of Law in support of the Motions, and the defendant's affidavit and other letters — constitute an "answer" within the meaning of the Georgia Civil Practice Act. We hold that they do not constitute an answer.

Our Code states that there shall be "a complaint and an answer," also a third-party complaint and answer, there may be a reply to counterclaim and an answer to a cross-claim, but "[n]o other pleading shall be allowed..." Code Ann. § 81A-107 (a) (CPA § 7 (a); Ga. L. 1966, pp. 609, 618; 1967, pp. 226, 230) In other words, these documents — and these documents alone constitute the pleadings. "A motion is not a pleading, although certain of the rules relative to pleadings are made applicable to motions by Rule 7 (b) (2)." 2A Moore's Fed. Practice 1541, Motions, § 7.05.

"The purpose of service of process is to give adequate notice of a claim against a defendant and to compel him to appear and answer." *Sheet Metal Workers Int. Assn. v. Carter,* 241 Ga. 220, 221 (244 SE2d 860). Under Code Ann. § 81A-108 (b) (CPA § 8; Ga. L. 1966, pp. 609, 619, as amended through 1976, pp. 1047, 1048), it is required that "[a] party shall state in short and plain terms his defenses to each claim asserted and *shall admit or deny* the averments upon which the adverse party relies." (Emphasis supplied.) "*Averments* in a pleading to which a responsive pleading is required, other than those as to the amount of damage, *are admitted when not denied* in the responsive pleading." Code Ann. § 81A-108 (d), supra. (Emphasis supplied.) The CPA requires "every defense to a claim for relief in any pleading shall be asserted in the responsive pleading . . . if one is required, except that certain specified defenses may be raised by motion." *Hayes v. Superior Leasing Corp.,* 136 Ga. App. 98 (220 SE2d 86); see Code Ann. § 81A-108 (c) for affirmative defenses required to be plead. One of those required to be in the responsive pleading or by motion is lack of

jurisdiction over the person. Code Ann. § 81A-112 (b) (2) (CPA § 12; Ga. L. 1966, pp. 609, 622, as amended through 1972, pp. 689, 692, 693). Thus, the choice is by the pleader as to whether he desires to present this defense by responsive pleading or by motion, and if by motion it must be within the time for responding. *Hayes v. Superior Leasing Corp.*, 136 Ga. App. 98, 99, supra. Thus, the defendant was within his right in presenting his motion to dismiss for lack of jurisdiction over his person within the time permitted for answering.

Our appellate courts have repeatedly held that under the spirit and intent of the Civil Practice Act, we have substituted "notice pleading" for "issue pleading" and pleading requirements are liberally construed in favor of the pleader. *Tahamtan v. Dixie Ornamental Iron Co.*, 143 Ga. App. 561 (239 SE2d 217). " 'Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end.' Maty v. Grasselli Chemical Co., 303 U. S. 197, 200 (58 SC 507, 82 LE 745)." *Roberts v. Farmer*, 127 Ga. App. 237, 241 (193 SE2d 216). Thus, as we continually remind practitioners "there is no magic in the nomenclature given a pleading, but it is the substance of the pleadings that determines its nature . . . '(I)n classifying pleadings we will construe them to serve the best interests of the pleader, judging the pleading by its function rather than by its name.' " *Hayes v. Superior Leasing Corp.*, 136 Ga. App. 98 at 100, supra.

The issue is refined as to whether the motion and its attached Memorandum, affidavit, and exhibits, are the legal equivalent of an answer? In *First Nat. Bank v. McClendon*, 147 Ga. App. 722, 723 (250 SE2d 175), we held that an affirmative defense of accord and satisfaction could not be raised by affidavit in support of a motion for summary judgment which was required to be specifically plead by Code Ann. § 81A-108 (c), supra. This court did not directly address this issue in *Hopkins v. Harris*, 130 Ga. App. 489 (203 SE2d 762), in which the defendant failed to file an answer but did file a motion to dismiss for failure to state a claim, and three motions for summary judgment. The trial court overruled the defendant's motion to dismiss and granted a default judgment, without ruling on the summary judgment motions. A nunc pro tunc order was entered denying the motions for summary judgment after judgment had been rendered. This court affirmed, holding that the latter motions could not be considered as responses as they were not filed within the time required for filing an answer. Chief Judge Bell, specially concurred, noting that he would not find such "motions are responsive pleadings and [he] would dissent to any holding that they were." Id. at 491.

In *Tahamtan v. Dixie Ornamental Iron Co.*, 143 Ga. App. 561,

supra, the defendant filed a letter with the court, designating the name and number of the action, and set forth his defense of payment and enclosed cancelled checks made out to the plaintiff. We found this to be a sufficient answer because it was intended as an answer and specifically asserted the principal defense relied upon by the defendant. In another case, *Whitby v. Maloy,* 145 Ga. App. 785 (245 SE2d 5), one of the defendants failed to answer but did respond to plaintiff's interrogatories. Counsel contended that defendant's responses to the interrogatories were in substance an answer and were sufficient to raise an issue of proper venue. The trial court dismissed the action because of improper venue. This court reversed, holding that the defendant had not raised in any motion or responsive pleading a challenge to the jurisdiction of the court and the trial court erred in dismissing the action. See *Dromedary, Inc. v. Restaurant Equip. Mfg. Co.,* 153 Ga. App. 103, 104 (264 SE2d 571).

We shall apply the same test we used in *Whitby,* supra, to the allegedly responsive pleadings in the instant case. Assuming arguendo that the motion and its enclosures could be treated as pleadings, we have found no language in defendant's motion, affidavits, or exhibits, that could reasonably be construed as a general denial of the averments of the complaint — as required for an answer by Code Ann. § 81A-108 (b), nor any specific denial of the principal allegations of the separate paragraphs of the complaint — except as to jurisdiction. See *Whitby v. Maloy,* 145 Ga. App. 785, 787, supra. Any allegation as to lack of jurisdiction over the person has been decided adversely to the defendant in Division 1 above. There are no specific denials as to the allegations of plaintiff's complaint as to execution of the escrow agreement, that defendant was to receive $50,000 cash earnest money, to be retained as liquidated damages in the event of default, and that defendant accepted from the purchaser a $10,000 check and $40,000 note contrary to his agreement, and plaintiff was thereby damaged.

As there was no general denial, and no specific denial as to the principal allegations of the complaint, such allegations stand admitted. There was no answer — within the meaning of the Code, and the trial court did not err in entering default judgment. See *B-X Corp. v. Fulton Plumbing Co.,* 140 Ga. App. 131 (2) (230 SE2d 331).

3. The remaining enumerations of error either were not raised in the court below, are mooted by the above holding, or are without merit.

Judgment affirmed. Shulman and Carley, JJ., concur.

ARGUED SEPTEMBER 16, 1980 — DECIDED OCTOBER 20, 1980 —

REHEARING DENIED NOVEMBER 14, 1980 — CERT. APPLIED FOR.

Action on contract. Richmond Superior Court. Before Judge Fleming.

Stephen H. Steinberg, for appellant.

J. Patrick Claiborne, William J. Cooney, for appellee.

IN THE SUPERIOR COURT FOR THE COUNTY OF RICHMOND, STATE OF GEORGIA

WILLIAM J. COONEY, as Executor of the Estate of DONALD S. FORD, Deceased,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 7336-C
FRANK M. BOSWORTH, d/b/a GULF TO BAY TITLE COMPANY,	)	
Defendant,	)	

ORDER

The Motion to Set Aside Judgment filed by the Defendant in the above-styled action coming on regularly to be heard before this Court on May 15, 1980; and

Counsel for the Plaintiff and Defendant having presented arguments and citation to the Court, both orally and in the form of written Memoranda; and

The Court having considered the ar-

guments of counsel for both Plaintiff and Defendant and having considered the record; and

The Court having determined that the Defendant did not file an Answer to the Complaint;

IT IS HEREBY ORDERED AND ADJUDGED that the Motion to Set Aside Judgment is hereby denied.

This 28th. day of May, 1980.

s/ William M. Fleming, Jr.
WILLIAM M. FLEMING, JR.
Judge, Superior Court
Richmond County, Georgia

PRESENTED BY:
s/ J. Patrick Claiborne
J. Patrick Claiborne
William J. Cooney, P. C.
1104 Georgia Bank Building
Augusta, Georgia 30902

IN THE SUPERIOR COURT FOR THE COUNTY OF RICHMOND, STATE OF GEORGIA

WILLIAM J. COONEY, as Executor of the Estate of DONALD S. FORD, Deceased Plaintiff, vs. FRANK M. BOSWORTH, d/b/a GULF TO BAY TITLE COMPANY, Defendant,	)	CIVIL ACTION NO. 7336-C

JUDGMENT

This action having become in default on February 24, 1980, by the failure of the Defendant to file his answer or other defensive pleadings, and fifteen (15) days having elapsed from the date of default and the default not having been opened as a matter of right or by order of the court and all motions having been disposed of, it is

ORDERED AND ADJUDGED, that Plaintiff recover of Defendant the sum of Fifty Thousand and No/100 Dollars ($50,000.00) with interest and costs of this action.

This the 29th. day of April, 1980.

s/ William M. Fleming, Jr.
Judge, Superior Court
Richmond County, Georgia

IN THE SUPERIOR COURT FOR THE COUNTY OF RICHMOND, STATE OF GEORGIA

WILLIAM J. COONEY, as Executor of the Estate of DONALD S. FORD, Deceased, Plaintiff, vs. FRANK M. BOSWORTH, d/b/a GULF TO BAY TITLE COMPANY, Defendant,	)	CIVIL ACTION NO. 7336-C

ORDER

The Defendant's Motion to Dismiss for Lack of Jurisdiction over the Person and Subject Matter, the Defendant's Motion to Quash Demand for Interrogatories, and the Plaintiff's Motion for an Order to Compel Discovery having come on for a hearing before me this day, and after having heard the argument of Stephen H. Steinberg, counsel for Defendant, and J.

Patrick Claiborne, counsel for Plaintiff, and after due consideration of counses' argument, the pleadings, and Defendant's Affidavit,

IT IS ORDERED:

(1) That the Defendant's Motion to Dismiss for Lack of Jurisdiction over the Person and Subject Matter is denied; and

(2) That the Plaintiff's Motion for an Order to Compel Discovery is granted and the Defendant is required to answer within twenty (20) days the Interrogatories which Plaintiff has propounded to him.

This 29th. day of April, 1980.

s/ William M. Fleming, Jr.
William M. Fleming, Jr.
Judge, Superior Court
Richmond County, Georgia

Order presented by:
s/ J. Patrick Claiborne
Attorney for Plaintiff
William J. Cooney as Executor
of the Estate of Donald S. Ford

IN THE SUPREME COURT OF THE STATE OF GEORGIA

FRANK M. BOSWORTH, d/b/a GULF TO BAY TITLE COMPANY, Appellant,	)	Number 37068 Supreme Court of Georgia
VS.	)	Number 60536 Court of Appeals of Georgia
WILLIAM J. COONEY, as Executor of the Estate of DONALD S. FORD, Deceased Appellee	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Frank M. Bosworth, d/b/a Gulf To Bay Title Company, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order denying a writ of certiorari, affirming the judgment by default entered in the Superior Court for the County of Richmond, State of Georgia on April 29, 1980.

APPENDIX F

This appeal is taken pursuant to

28 U.S. C. Section 1257.

s/ FRANK M. BOSWORTH, JR.
Frank M. Bosworth, Jr.
Attorney for Appellant
Pro Se
1518 Winfield West,
Clearwater, Florida 33516
Tel: (813) 442-6346

To:
Clerk, Supreme Court
of the State of Georgia.
Clerk, Court of Appeals
of Georgia.
William J. Cooney, Esq.
Attorney for Appellee

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV.[1]

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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3. PLEADINGS AND MOTIONS

81A-107 [CPA § 7] Pleadings allowed; form of motions

(a) Pleadings

There shall be a complaint and an answer; a third-party complaint, if a person who is not an original party is summoned under the provisions of section 81A-114; and a third-party answer, if a third-party complaint is served; there may be a reply to a counterclaim denominated as such; and an answer to a cross-claim, if the answer contains a cross-claim. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) Motions and other papers

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by this Title.

(c) Demurrers, pleas, etc., abolished

Demurrers, pleas and exceptions for insufficiency of a pleading shall not be used.

(Acts 1966, pp. 609, 618; 1967, pp. 226, 230.)

81A-112 [CPA § 12] Defenses and objections—when and how presented—by pleading or motion; motion for judgment on pleadings

(a) When presented

A defendant shall serve his answer within 30 days after the service of the summons and complaint upon him, unless otherwise provided by statute. A cross-claim or counterclaim shall not require an answer, unless one is required by order of the court, and shall automatically stand denied.

(b) How presented

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion in writing: (1) lack of jurisdiction over the subject-matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under section 81A-119. A motion making any of these defenses shall be made before or at the time of pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in section 81A-156, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by section 81A-156.

(c) Motion for judgment on the pleadings

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in section 81A-156, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by section 81A-156.

(d) Preliminary hearings

The defenses specifically enumerated (1) through (7) in subdivision (b) of this section, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this section shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for more definite statement

If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a proper responsive pleading, he shall nevertheless answer or respond to the best of his ability, and he may move for a more definite statement. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 15 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to strike

Upon motion made by a party within 30 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of defenses in motion

A party who makes a motion under this section may join with it any other motions herein provided for and then available to him. If a party makes a motion under this section but omits therefrom any defense or objection then available to him which this section permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection (h) (2) hereof on any of the grounds there stated.

(h) Waiver or preservation of certain defenses

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subsection (g), or (B) if it is neither made by motion under this section nor included in a responsive pleading, as originally filed.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under section 81A-119, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under section 81A-107(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject-matter, the court shall dismiss the action.

(i) The officer making service of process and the principal officer in charge of service made by a deputy need not be made a party to any action or motion where the defense or defenses under subsections (b) (2), (4) or (5) of this section are asserted by motion or by answer. Any party to the action may give notice of the objection to the service, made pursuant to said subsections, to the officer making the service and the principal officer in case of service made by a deputy, and the court shall afford such officer or officers opportunity to defend his service, in which case the decision on the question of service shall be conclusive on the officer and his principal in case of service by a deputy.

(Acts 1966, pp. 609, 622; 1967, pp. 226, 231; 1968, pp. 1104, 1106; 1972, pp. 689, 692, 693.)

7. JUDGMENT

81A-154 [CPA § 54] Judgments

(a) Definition

"Judgment" as used in this Title includes a decree and any order from which an appeal lies.

(b) Judgment upon multiple claims or involving multiple parties

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment

(1) A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings; but the court shall not give the successful party relief, though he may be entitled to it, where the propriety of such relief was not litigated and the opposing party had no opportunity to assert defense to such relief.

(2) Notwithstanding the provisions of subsection (c)(1) where a claim in an action for medical malpractice, as hereinafter defined, does not exceed $10,000, a judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Where the claim exceeds $10,000, a judgment by default may be rendered for the amount determined upon a trial of the issue of damages, provided notice of such trial is served upon the defaulting party at least three days prior to that trial.

(3) As used in this section, the term "action for medical malpractice" means any claim for damages resulting from the death of or injury to any person arising out of (a) health, medical, dental or surgical: (1) service; (2) diagnosis; (3) prescription; (4) treatment; or (5) care; rendered by a person authorized by law to perform such services or by any person acting under the supervision and control of such lawfully authorized person, or (b) care or service rendered by any public or private hospital, nursing home, clinic, hospital authority, facility or institution, or by any officer, agent or employee thereof acting within the scope of his or her employment.

(d) Costs

Except where express provision therefor is made in a statute, costs shall be allowed as a matter of course to the prevailing party unless the court otherwise directs, but cost against the State of Georgia, its officers, agencies, and political subdivisions shall be imposed only to the extent permitted by the law.

(Acts 1966, pp. 609, 658; 1976, pp. 1047, 1049, eff. Sept. 6, 1976.)

COURT OF APPEALS
OF THE STATE OF GEORGIA

Atlanta, March 9, 1981

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

60536. Frank M. Bosworth, Jr. v.

William J. Cooney, Exr.

Upon consideration of the Motion for Supersedeas Bond in the above case, it is ordered that it be hereby denied. See Rule 44, Rules of the Supreme Court of the United States.

COURT OF APPEALS OF THE STATE OF GEORGIA

Clerk's Office, Atlanta, Mar. 9,1981

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia. Witness my signature and the seal of said court hereto affixed the day and year last above written.

S/ Alton Hawk, Clerk

APPENDIX I

MAY 29 19

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 80-1805

FRANK M. BOSWORTH, d/b/a
GULF TO BAY TITLE COMPANY,
Appellant,

v.

WILLIAM J. COONEY, as EXECUTOR
OF THE ESTATE OF DONALD S. FORD, Deceased,
Appellee.

ON APPEAL
FROM THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS APPEAL

WILLIAM J. COONEY
1104 Georgia Bank Building
Augusta, Georgia 30902

Counsel for Appellee

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 80-1805

FRANK M. BOSWORTH, d/b/a
GULF TO BAY TITLE COMPANY,
Appellant,

v.

WILLIAM J. COONEY, as EXECUTOR
OF THE ESTATE OF DONALD S. FORD, Deceased,
Appellee.

ON APPEAL
FROM THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS APPEAL

Pursuant to Rule 16.1(b) of the Rules of the Supreme Court, Appellee moves the Court to dismiss the appeal on the grounds hereinafter set forth.

JURISDICTION

This is an appeal from the denial of the Supreme Court of Georgia to grant the

writ of certiorari to review the decision of the Court of Appeals of Georgia affirming the entry of a default judgment against the Appellant in the trial court. Appellant invokes the jurisdiction of this Court under 28 U.S.C. §1257. The judgment of the trial court was entered on April 29, 1980, and affirmed by the Court of Appeals of Georgia on October 20, 1980 (J.S., App. B). Rehearing was denied by the Court of Appeals on November 14, 1980. The Supreme Court of Georgia denied the writ of certiorari on February 3, 1981, and the Notice of Appeal to this Court was filed on February 17, 1981.

QUESTIONS PRESENTED

1. Whether default judgment was properly entered against Appellant because he did not file an Answer to the Complaint served upon him as required by Section 12

of the Georgia Civil Practice Act (Ga. Code Ann. §81A-112(a)).

2. Whether Appellant timely raised the issue of denial of due process in the state court when he states he did not raise this issue in the trial court or in the Court of Appeals of Georgia but waited until he applied for writ of certiorari to the Supreme Court of Georgia to raise this issue.

STATUTES INVOLVED

Two Georgia statutes are involved:

(a) Section 12 of the Georgia Civil Practice Act (Ga. Code Ann. §81A-112), which is set out in Appellant's Jurisdictional Statement, Appendix H-2;

(b) Section 55 of the Georgia Civil Practice Act (Ga. Code Ann. §81A-155), which is set out in Appendix A, this Motion.

STATEMENT

Appellee Cooney filed suit on January 16, 1980, in the Superior Court of Richmond County, Georgia, against the Appellant Frank M. Bosworth, Jr., a resident of Florida (J.S., App. B-3) and an experienced attorney who has practiced law for many years in the States of New York and Florida (J.S., 10,15). The suit alleged that Appellant had breached an escrow agreement in connection with a real estate transaction which he had executed in Augusta, Georgia. The terms of the escrow agreement required Appellant to accept only cash earnest money from the prospective purchaser. However, Appellant accepted a check and a note which were subsequently dishonored when presented for payment. As a result, Appellee suffered damages (J.S., App. B-5).

The return of service of the Summons and Complaint shows Appellant Bosworth was served in Clearwater, Florida, (App. B, this Motion). The Summons clearly advised Appellant that:

> You are hereby summoned and required to file with the Clerk of said court . . . an answer to the complaint which is herewith served upon you, within thirty (30) days of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

However, instead of filing an Answer as required to do by the Summons, Appellant elected to file a motion contesting the trial court's subject matter and personal jurisdiction over him (J.S.-10, 11).

On April 28, 1980, the trial court held a hearing on Appellant's Motion to Dismiss and denied the jurisdictional motions (J.S.-12, App. B-1). The trial

court subsequently entered a default judgment against Appellant because he had not filed an Answer to the Complaint as required under the Georgia Civil Practice Act or filed a motion to open the default as permitted by the Georgia Civil Practice Act (J.S., App. D). Thereafter, the Appellant moved to set aside the judgment entered against him on the ground that the documents which he had filed constituted an Answer to the Complaint (App. C, this Motion). The trial court denied Appellant's motion because he had not filed an Answer as required by law (J.S., App. D). Appellant then appealed to the Court of Appeals of Georgia enumerating seven errors allegedly committed by the trial court (J.S.-12). The denial of due process was not one of the enumerated errors (App. D, this Motion). Appellant states

in his jurisdictional statement that the first time he raised the due process issue was when he applied to the Supreme Court of Georgia for the writ of certiorari (J.S.-13,14). That Court denied Applicant's petition for the writ of certiorari without comment (J.S., App. A).

ARGUMENT

1. Default judgment was properly entered against Appellant because he did not file an Answer to the Complaint within thirty (30) days after service of the Summons upon him as required by Section 12 of the Georgia Civil Practice Act (Ga. Code Ann. §81A- 112(a)).

Appellant's failure to comply with the Georgia Civil Practice Act was the basis for the entry of the default judgment against him, not any deprivation of due process. Section 12(a) of the Georgia

Civil Practice Act (Ga. Code Ann. §81A-112(a)) states that: "A defendant shall serve his answer within thirty (30) days after service of the summons and complaint upon him, unless otherwise provided by statute." (Emphasis added) (J.S., App. H-2). Section 12(a) of the Georgia Civil Practice Act is significantly different from Rule 12(a) of the Federal Rules of Civil Procedure in that under the Georgia Civil Practice Act the filing of a motion does not toll the time in which to file an Answer. The requirement in Georgia that a defendant shall serve his Answer within thirty (30) days after the service of Summons and Complaint upon him is absolute.

The purpose of service of process is to give adequate notice of a claim against a defendant and to compel him to appear and Answer. Sheetmetal Workers Int'l Association v. Carter, 241 Ga. 220,

at 221, 244 S.E.2d 860 at 861 (1978). In the case at bar, Appellant was properly served with a copy of the Summons and the Complaint (J.S., App. B-1). The Summons expressly advised him that he was required to file an Answer to the Complaint within thirty (30) days after service of the Summons upon him or suffer entry of judgment by default (App. A, this Motion). Appellant Bosworth acknowledges in his Jurisdictional Statement that he read Section 12 of the Georgia Civil Practice Act (Ga. Code Ann. §81A-112) (J.S.-10). Therefore, it is undisputed that Appellant had actual knowledge of the Georgia statute which required him to file an Answer within thirty (30) days after Service of Summons. Nevertheless, instead of filing an Answer to the Complaint as required by the statute, he elected to defend against the action by filing a motion contesting the trial

court's jurisdiction (J.S.-10,11). On appeal, the Court of Appeals of Georgia carefully examined the documents filed by Appellant to see if they were the legal equivalent of an Answer (J.S., App. B-4). That court concluded:

> There are no specific denials as to the allegation of plaintiff's complaint as to the execution of the escrow agreement, that defendant was to receive $50,000 in cash earnest money, to be retained as liquidated damages in the event of default, and that defendant that fendant accepted from the purchaser a $10,000 check and $40,000 note contrary to his agreement, and plaintiff was thereby damaged.
>
> As there was no general denial, and no specific denial as to the principal allegations of the complaint, such allegations stand admitted. There was no answer - within the meaning of the Code, and the trial court did not err in entering default judgment (J.S., App. B).

Section 55(a) of the Georgia Civil Practice Act (Ga. Code Ann. §81A-155(a)) provides that:

> If in any case an answer has not been filed within the time required by this Title, such a case shall automatically become in default unless the time for filing the answer has been extended as provided by law. The default may be opened as a matter or [sic] right by the filing of such defenses within fifteen (15) days of the day of default upon the payment of costs. If the case is still in default after the expiration of such period of fifteen (15) days, the plaintiff, at any time thereafter, shall be entitled to verdict and judgment by default, in open court or in chambers, as if every item and paragraph of the petition were supported by proper evidence without the intervention by a jury (App. A, this Motion).

Section 55(a) is explicit that a party who does not file an Answer within the prescribed time is automatically in default. Section 55 of the Georgia Civil Practice Act differs from Rule 55(a) of

the Federal Rules of Civil Procedure in that Section 55 does not provide for a hearing before entry of default judgment as does its federal counterpart. Under Section 55 of the Georgia Act, when a case is in default, judgment may be taken at any time after the fifteen (15) day period for opening the default as a matter of right has expired. Jessup Carpet Factory Outlet, Inc. v. Ken Carpets of La Grange, Inc., 142 Ga. App. 301, 235 S.E.2d 684 (1977).

Pursuant to the Georgia Civil Practice Act, a defendant who is properly served has been put on notice that he must file an Answer to the Complaint within thirty (30) days after service of the Summons and the Complaint upon him. If not, forty-five (45) days after service of the Summons the plaintiff will be entitled to judgment by default without further notice or proceedings. Appellant received

a copy of the Summons and Complaint. He personally reviewed the applicable Georgia statute. Appellant, an experienced attorney, cannot now be heard to complain that he was denied due process. This is especially true where Appellant was represented in the Georgia proceedings by local counsel (J.S.-12).

2. The due process violation which Appellant seeks to raise in this Court was not timely or properly raised in the state courts.

It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the federal claim was adequately presented in the state system. Cardinale v. Louisiana, 394 U.S. 437, 438, (1969); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); Oxley Stave Co. v. Butler Co., 166 U.S. 648,

655 (1897). In Webb v. Webb, 49 U.S.L.W. 4500, 4501 (May 18, 1981), Justice White, speaking for the Court, stated the rule that:

> This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." Street v. New York, 394 U.S. 576, 582 (1969); see also Fuller v. Oregon, 417 U.S. 40, 50, n. 11 (1974); Chambers v. Mississippi, 410 U.S. 284, 290, n. 3 (1973); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945).

Appellant admits in his Jurisdictional Statement that he did not raise the issue of denial of due process until he applied to the Supreme Court of Georgia for the writ of certiorari (J.S.-13.14). That court denied his application. (J.S., App. A). In the trial court, Appellant moved to set aside the judgment entered

against him on the sole ground that the documents filed by him constituted an Answer (App. C, this Motion). In his appeal to the Court of Appeals of Georgia, Appellant failed to enumerate the denial of due process as one of the seven enumerations of error which he alleged were committed by the trial court (App. D, this Motion). Appellant's assertion of the issue of denial of due process for the first time in his Application for the Writ of Certiorari to the Supreme Court of Georgia comes too late in the proceedings.

For the reasons stated, it is respectfully submitted that the appeal should be dismissed.

William J. Cooney
WILLIAM J. COONEY

May 1981.

APPENDIX A

CIVIL PRACTICE ACT

81A-155 [CPA § 55] DEFAULT

(a) Default judgment

If in any case an answer has not been filed within the time required by this Title, such case shall automatically become in default unless the time for filing the answer has been extended as provided by law. The default may be opened as a matter or [sic] right by the filing of such defenses within 15 days of the day of default upon the payment of costs. If the case is still in default after the expiration of such period of 15 days, the plaintiff, at any time thereafter, shall be entitled to verdict and judgment by default, in open court or in chambers, as if every item and paragraph of the

petition were supported by proper evidence without the intervention of a jury, unless the action is one ex delicto or involves unliquidated damages, in which event the plaintiff shall be required to introduce evidence and establish the amount of damages before the court without a jury as to actions ex contractu, and before a jury as to actions ex delicto with the right of the defendant to introduce evidence as to damages and the right of either to move for a new trial in respect of such damages. An action based upon account shall not be considered one for unliquidated damages within the meaning of this section.

(b) Opening default

At any time before final judgment, the court, in its discretion, upon payment of costs, may allow the default to be opened

for providential cause preventing the filing of a plea or for excusable neglect or where the judge, from all the facts, shall determine that a proper case has been made for the default to be opened, on terms to be fixed by the court. In order to allow the default to be thus opened, the showing shall be made under oath, shall set up a meritorious defense, shall offer to plead instanter, and announce ready to proceed with the trial.

(Acts 1966, pp. 609, 659; 1967, pp. 226, 238.)

APPENDIX B

Second Original Copy

No. 7336-C

SUPERIOR COURT
RICHMOND COUNTY, GEORGIA

William J. Cooney, as Executor
of the Estate of Donald S. Ford,
Deceased,

Plaintiff,

v.

Frank M. Bosworth, d/b/a
Gulf to Bay Title Company,

Defendant.

COMPLAINT

FILED IN OFFICE

this 17th day of January, 1980

/s/ Helen M. Speltz,
Clerk

CIVIL WRITS
Reel No. 96
B/B 119 Pg. 69

WILLIAM J. COONEY, P.C.
1104 Georgia Bank Building
Augusta, GA 30902
Plaintiff's Attorney

THE SUPERIOR COURT
FOR THE COUNTY OF RICHMOND
STATE OF GEORGIA

Civil Action, File Number

William J. Cooney, as Executor of the Estate of Donald S. Ford, Deceased,	)	
Plaintiff	)	
v.	)	Summons.
Frank M. Bosworth, d/b/a Gulf to Bay Title Company,	)	
Defendant	)	

To the above-named Defendant:

You are hereby summoned and required to file with the clerk of said court and serve upon William J. Cooney, P.C., plaintiff's attorney, whose address is 1104 Georgia Bank Building, Augusta, GA 30902, an answer to the complaint which is herewith served upon you, within 30 days after service of this summons upon you, exclusive of the day of service. If

you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

This 17th day of January, 1980.

/s/ Helen M. Speltz
Clerk of Court

APPENDIX C

IN THE SUPERIOR COURT OF
RICHMOND COUNTY, STATE OF GEORGIA
Civil Action, File No. 7336-C

WILLIAM J. COONEY, AS EXECUTOR OF THE ESTATE OF DONALD S. FORD, DECEASED, PLAINTIFF	MOTION TO SET ASIDE JUDGEMENT;
VS.	MOTION FOR
FRANK M. BOSWORTH, d/b/a GULF TO BAY TITLE COMPANY, DEFENDANT	STAY OF JUDGEMENT

The Defendant moves the Court pursuant to Georgia Code Annotated Section 81A-160(d) to set aside the Judgement in the above-styled action dated April 29, 1980, on the ground that a non-amendable defect

appears on the face of the record, to wit: that the documents heretofore filed by the Defendant constitute an Answer, and the action was not in default at the time the aforesaid Judgement was executed.

Defendant further moves the Court to stay the aforesaid Judgement, pending the Court's hearing on the within motion.

This 9th day of May, 1980.

/s/ Stephen H, Steinberg
STEPHEN H. STEINBERG

Attorney for Defendant

910 Georgia Railroad Bank Building
Augusta, Georgia 30902

APPENDIX D

IN THE COURT OF APPEALS OF GEORGIA

FRANK M. BOSWROTH, (sic) d/b/a GULF TO BAY TITLE COMPANY, APPELLANT VS. WILLIAM J. COONEY, AS EXECUTOR OF THE ESTATE OF DONALD S. FORD, DECEASED, APPELLEE	CASE NO. 60536 ENUMERATION OF ERRORS

1. The trial court erred in granting the Default Judgment in favor of the Plaintiff on the ground that a non-amendable defect appears on the face of the record, to-wit: That the documents filed by the Defendant constituted an Answer, and the action was not in default at the time the Default Judgment was granted.

2. The trial court erred in granting the Default Judgment in favor of the Plaintiff because the exhibits attached to Plaintiff's Complaint show that there is more than one seller and Plaintiff has no standing to sue for the entire "liquidated damages."

3. The trial court erred in granting the Default Judgment in favor of the Plaintiff because the record shows that Donald S. Ford, prior to his death, had deeded his entire interest in the subject property to his wife, Helen T. Ford, and Plaintiff has no standing to bring this action.

4. The trial court erred in granting the Default Judgment in favor of the Plaintiff because all of the Sellers should have been joined as Plaintiffs for a just adjudication of this action under Ga. Code Ann. §81A-119, and in the ab-

sence of such joinder, Plaintiff was required to plead reasons for nonjoinder.

5. The trial court erred in granting the Default Judgment in favor of the Plaintiff because the action involves unliquidated damages, and the Plaintiff should have been required to prove his damages before the Court.

6. The trial court erred in denying Defendant's Motion to Set Aside the Judgment on the grounds given in Enumerations of Error Nos. (1) - (5) above and said grounds are incorporated herein by reference in their entirety.

7. The trial court erred in denying Defendant's Motion to Dismiss for Lack of Jurisdiction Over the Person on the ground that the Court has no jurisdiction over the person of Defendant, because the Defendant is a resident of the State of Florida, not Georgia, and the undisputed facts in the record would not give the

Court "Long-Arm" jurisdiction over the Defendant under Ga. Code Ann. §24-113.1.

STATEMENT OF JURISDICTION

The Court of Appeals of the State of Georgia, rather than the Supreme Court of the State of Georgia, has jurisdiction of this case on appeal for the reason that this is an action on a contract and does not involve any matter, the exclusive jurisdiction of which is reserved to reserved to the Supreme Court of Georgia.

JAY M. SAWILOWSKY, P.C.
BY /s/ Jay M. Sawilowsky
JAY M. SAWILOWSKY
ATTORNEY FOR APPELLANT
902 Georgia Railroad
Bank Bldg.
Augusta, Georgia 30902
Tel. (404) 722-8853

/s/ Stephen H. Steinberg

STEPHEN H. STEINBERG, LEADING COUNSEL

ATTORNEY FOR APPELLANT

STEINBERG & STEINBERG

910 Georgia Railroad Bank Building

Augusta, Georgia 30902

Tel. (404) 722-1516

CERTIFICATE OF SERVICE

This is to certify that I have mailed this day three (3) copies of this Motion to Dismiss Appeal to Frank M. Bosworth, Jr., Appellant and Attorney Pro Se in the foregoing action, 1518 Winfield Road West, Clearwater, Florida 33516, by depositing the same in the United States mail in a properly addressed, postage pre-paid, envelope.

Dated this 27th day of May, 1981.

William J. Cooney

WILLIAM J. COONEY